UNITED
NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 565

Case No. 612: AL-ATRAQCHI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Luis de Posadas Montero, Vice-President; Mr. Samar Sen;

Whereas at the request of Mohammed Ali Al-Atraqchi, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended until 15 July 1991, the time-limit for the filing of an application to the Tribunal;

Whereas, on 9 July 1991, the Applicant filed an application containing the following pleas:

"II. PLEAS

The Tribunal is respectfully requested:

1. To find that the Secretary-General has failed to suspend staff rule 104.14 (which governs promotions) as required by staff regulation 12.3, and that, therefore, the Vacancy Management and Redeployment System, introduced by ST/AI/338 and its addenda, is illegal.

2. To find that the discretionary power of the Secretary-General to promote staff members is not absolute as claimed by the Respondent during the JAB [Joint Appeals Board] proceedings.

3. To find that Applicant did not receive the fullest consideration with regard to his candidacy for the post D-1, Chief Security Council and Political Committees Division, Department of Political and Security Council Affairs, No. 90-P-PSC-251-NY, as per this Tribunal's judgements No. 362 (Williamson) and No. 447 (Abbas).

4. To find that the JAB failed to fully investigate his appeal, and for instance, did not mention at all the affidavit signed by nine staff members, which was mentioned in paragraph ... of the earlier JAB report on his case (...) with reference to the issue of prejudice against him and of favouritism towards Mr. Nicolae Ion.

5. To find that the Secretary-General's refusal to investigate, as unanimously requested by the JAB in paragraph ... of the JAB report ..., the contention that it was widely known that Mr. Nicolae Ion would get the contested D-1 post even before he was promoted, proves that the selection process was vitiated from the beginning.

6. To find, if anything, that the issue of prejudice against Applicant has become more serious since his earliest JAB report.

7. To conclude that the selection process which awarded Mr. [James] Ngobi a promotion to D-1 was, therefore, null and void.

8. To conclude that Applicant was the most qualified of all candidates for this D-1 post.

9. And consequently, to order:

(a) Respondent to promote Applicant to the D-1 level, retroactively to the date when Mr. Ngobi was promoted to D-1.

(b) Retroactive wages and benefits at the D-1 level less wages and benefits received at the P-5 level from no later than the date of confirmation of the promotion which was denied to Applicant.

(c) Respondent to grant Applicant, in case this Tribunal does not wish to order specific performance, damages equal to two years net base salary.

(d) Additional damages for the continuous hindrance to the development of Applicant's career."

Whereas the Respondent filed his answer on 3 December 1991;

Whereas the Applicant filed written observations on 14 February 1992;

Whereas, on 28 May 1992, the Applicant submitted an additional statement and produced additional documents and on 5 June 1992, the Respondent provided his comments thereon;

Whereas, on 11 June 1992, the Applicant requested the Tribunal to postpone its consideration of the present case until the Respondent conducted an investigation recently decided upon, related to Judgement No. 538 and on 25 June 1992, the Tribunal rejected the Applicant's request;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 7 October 1967, under a probationary appointment at the P-2 level as an Associate Statistician with the Statistical Office of the Department of Economic and Social Affairs. On 1 October 1969, his appointment was converted to a permanent appointment and on 1 June 1970, he was promoted to the P-3 level as a Statistician. On 1 September 1973, the Applicant was transferred to the Council and Committee Services Section, Security Council and Political Committees Division, Department of Political and Security Council Affairs, as an Economic Affairs Officer. On 1 April 1974, he was promoted to the P-4 level and on 1 July 1979, to the P-5 level as a Senior Political Affairs Officer.

On 16 April 1990, the Administration announced in Internal Vacancy Announcement 90-P-PSC-251-NY the vacancy of the D-1 post of Chief of the Security Council and Political Committees Division, in the Department of Political and Security Council Affairs. Staff members at level D-1 or P-5 were eligible to apply. The Applicant and other staff members applied for the post. The selection for the post was conducted under the Vacancy Management and Staff Redeployment system established under Secretary-General's Bulletin ST/SGB/221 of 22 December 1986 and administrative instruction ST/AI/338 of the same date (and its addenda).

According to this administrative instruction, the system was designed to fill through redeployment essential posts that were vacant as a result of the recruitment freeze or projected to become vacant in the near future, but it was only the first step towards establishing a more rational human resources management system and towards a more comprehensive procedure that would involve a thorough review of all posts in the context of measures being taken to streamline and rationalize the Organization. Under the new system, all posts vacant or expected to become vacant would be reviewed by departments

and offices to determine which posts were essential in order to meet programme mandates; all vacancies to be filled would be advertised and qualified staff members would be invited to apply, including those serving within the office where the vacancy was located; the candidates would be reviewed and evaluated by a Redeployment Committee - whose functions would be initially entrusted to the Appointment and Promotion Board at Headquarters for posts in the Professional category and above - which would recommend a short list of staff members determined to be the best qualified for each vacancy; and the short list of candidates would be communicated to the heads of department or office concerned, who would then make the final selection. However, as the 1986 promotion review was already under way, vacant posts already identified for staff members recommended for promotion would not be included in the review described above.

All applications for the post of Chief of the Security Council and Political Committees Division were accordingly forwarded to the Appointment and Promotion Board which, at its 1590th meeting held on 26 July 1990, short-listed, in alphabetical order, six candidates, including the Applicant, and decided that their names should be transmitted to the Department for final selection. On 20 August 1990, the Office of Human Resources Management informed the Applicant that, after careful evaluation of his application for the vacancy, he had not been selected for the post.

On 11 September 1990, the Applicant requested the Secretary-General to review the administrative decision of 20 August 1990, stating, inter alia, that his academic background, work experience in the Department and seniority were superior to those of the staff member selected for the post and that the decision not to promote him to the D-1 level against the post in question was contrary to staff regulations 4.2 and 4.4. In a reply dated 21 September 1990, the Chief of the Administrative Review Unit, Office of Human Resources Management, informed the Applicant that the review he had requested would be conducted, and if he received no answer to this letter within a month, he could file his appeal with the Joint Appeals Board.

On 5 November 1990, having received no further reply from the Secretary-General, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 26 April 1991. Its considerations and recommendations read as follows:

"Considerations

8. The Panel first considered Appellant's contentions - and Respondent's counter-arguments - with respect to staff rule 104.14(f)(iii)(a) and the suspension of the annual promotion review. The Panel could find no evidence that the Secretary-General had, in conformity with staff regulation 12.3, proposed to the General Assembly a change in the text of the rule which would have the effect of suspending or eliminating the annual promotion review. Moreover, after studying the text of GA Resolution 44/185, the Panel found no merit in Respondent's contention that that resolution '... appears to have disposed of the issue.' Operative paragraph 7 of the Resolution 44/185A does recognize the positive elements in the vacancy management programme, but operative paragraph 8(a) leaves for the General Assembly at its 45th session 'the review of rules, regulations and criteria for the promotion of staff.' The Panel believes that the implementation of these two paragraphs should not adversely affect the orderly procedure of the annual review.

9. The Panel concluded, therefore, that Appellant was correct in asserting that staff rule 104.14(f)(iii)(a) is still in force and that the Secretary-General has failed to observe its provisions and, consequently, the Applicant's terms of appointment.

10. The Panel was, however, of the view that the Appellant had been given full and fair consideration within the context of the vacancy management review. The fact that his name had been included in the short list approved by the Appointment and Promotion Board was in itself a sufficient indication. Since the candidate selected ultimately by the Department for the post was on the short list that was approved and duly submitted by the Appointment and Promotion Board for such selection and since the short list was not presented to the Department in an order of priority, the Panel could not find any evidence of prejudice against the Appellant.

11. It then considered whether and how Appellant should be indemnified, and came to the conclusion that there was no award to Appellant it could justly recommend. The Panel agreed that the Appellant had been injured, but the injury was not greater than that suffered by the vast majority of staff members who had also been denied the annual promotion review. While the Appellant was entitled to an annual review under staff rule 104.14(f)(iii)(a), he has not demonstrated that he would have been actually promoted had that review taken place. Since the absence of that annual review was not deliberately and uniquely imposed in his case, but rather was

suffered equally by all staff members who were similarly entitled to such a review, the Panel was unable to recommend any indemnity that would be limited solely to the Appellant. Any remedy to be instituted to rectify the problem should, therefore, apply equally to all affected staff members.

Recommendations

12. The Panel unanimously recommends that, unless and until the General Assembly formally adopts changes in the text of staff rule 104.14(f)(iii)(a), the annual promotion procedure specified therein should be followed.

13. The Panel makes no further recommendation in support of the appeal."

On 6 May 1991, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him that the Secretary-General had decided to maintain the contested decision and take no further action in the case. The letter read in part as follows:

"The Secretary-General, has re-examined your case in the light of the Board's report which made no recommendation in support of your appeal. He has taken note of the general recommendation made by the Board in paragraph 12 of its report.

The Secretary-General has decided to maintain the contested decision and that no further action be taken in your case. His decision is based on the Board's conclusion that you were given full and fair consideration for the post in question under the vacancy management system. The Secretary-General does not share, however, the reasoning of the Board in paragraphs 9 and 11 of the report which denies the validity of the vacancy management system. The Secretary-General promulgated the vacancy management system in Secretary-General's Bulletin ST/SGB/221 of 22 December 1986 which, while it remains in effect, has suspended the application of the procedure provided for in staff rule 104.14(f)(iii)(a), a promotion review to be conducted normally once a year. The establishment of the vacancy management system constituted a valid exercise of the Secretary-General's authority as Chief Administrative Officer."

On 9 July 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Secretary-General has failed to suspend staff rule 104.14, as required by staff regulation 12.3.

2. The discretionary power of the Secretary-General to promote staff members is not absolute.

3. The Applicant's candidature did not receive the fullest consideration.

4. The JAB did not conduct a fair and objective review of the Applicant's case, as required by staff rule 112.2(m).

5. The failure of the Secretary-General to investigate the affidavit signed by nine staff members stating that it was widely known that Mr. Nicolae Ion would receive a promotion to D-1 even before he was officially selected proves that the selection process was vitiated ab initio.

Whereas the Respondent's principal contentions are:

1. The introduction and subsequent implementation of the Vacancy Management and Staff Redeployment System (VMS) was a valid exercise of the Secretary-General's responsibilities as chief administrative officer of the Organization. VMS meets the requirements of a fair and reasonable promotion procedure.

2. The Applicant's claims that his rights were violated by the Respondent's failure to investigate charges made in a prior appeal are res judicata.

The Tribunal, having deliberated from 5 June to 2 July 1992, now pronounces the following judgement:

I. The Applicant challenges the decision conveyed to him on 6 September 1990, in which the Secretary-General decided not to select him for the post of Chief, Security Council and Political Committees Division, Department of Political and Security Council Affairs (PSCA), for which he had applied. This vacancy was filled following the procedure established by the Vacancy Management and Redeployment System (VMS). In the course of this procedure, the Applicant's application was reviewed by the Appointment and Promotion

Board (APB) and his name was placed on the short-list submitted to the Under-Secretary-General, PSCA, who finally selected another candidate from the short-list.

II. The Applicant, in his recourse, challenges the validity and applicability of the VMS and then goes on to claim that even if the VMS were to be considered valid, the contested decision would nevertheless be void, since he did not receive the fullest consideration during the selection process. Also, this process is viewed by the Applicant as tainted by prejudice as a consequence of the reluctance of the Administration to investigate his claim that, in a previous instance, a promotion he sought was virtually decided upon before the review of the candidates took place.

III. As far as the validity and applicability of the VMS is concerned, the Tribunal reiterates the conclusion reached in Judgement No. 537, Upadhya (1991), that the VMS was validly established. It is, therefore, applicable in the present case.

IV. The Applicant also claims that, even under the VMS, the outcome of the selection process is not valid because his application was not given the fullest consideration. In support of his claim, he relies on Judgement No. 447, Abbas (1989), where, in paragraph VII, the Tribunal held that "the burden of proof of having given consideration is on the Respondent, whenever a staff member questions that such consideration was given". On this basis, the Applicant contends that the Respondent has failed to produce evidence to prove that his application was duly considered during the selection process.

V. The Tribunal is unable to share this view for the following reasons. The VMS selection process, according to ST/AI/338, is conducted in two steps: the applications are first considered by the APB and a short-list is drawn up and submitted to the head of the department concerned; then, the head of the department makes his choice. As far as the first step is concerned, detailed guidelines, to be followed by the APB, are set forth in Chapter II of ST/AI/338. Once the APB concludes its review, the decision rests with the

head of the department. For this second phase, there are no guidelines. Under Chapter III of ST/AI/338, the head of the department concerned is free to choose any short-listed candidate he judges to be best qualified for the job.

VI. In the case of the Applicant, no evidence was or had to be submitted by the Administration to prove that the guidelines of Chapter II of ST/AI/338 had been followed. Since the Applicant's name was included in the short-list, his candidacy had been duly considered.

VII. As the Joint Appeals Board found, there was no evidence of any impropriety on the part of the head of the department in selecting someone other than the Applicant for the post. Since the selection is a matter entirely within the discretion of the head of the department, the Applicant's contentions are not sustainable in the absence of proof of abuse of discretion. No such proof exists in this case. Moreover, as the Tribunal noted in Judgement No. 538, Al-Atraqchi (1991), paragraph VII, it will not examine the Applicant's claim that his merits are superior to those of the candidate selected. The head of the department is free to make his own assessment.

VIII. For the foregoing reasons the Applicant's claims that he was not duly considered for promotion must be rejected.

IX. The Applicant also claims that the selection process was tainted because in another case of promotion in which he and others were involved, he produced evidence that the post he applied for was already earmarked for another staff member before the review by the APB and that no investigation of this issue had been carried out. The Tribunal is of the view that, even if the Applicant's allegations were proved correct, this would in no way affect the decision taken in this case. The alleged existence of prejudice against the Applicant and others in a different case is not sufficient to prove that the Applicant was subjected to prejudice in the present case.

X. For the above-mentioned reasons, the application is rejected.

(Signatures)

Jerome ACKERMAN
President

Luis de POSADAS MONTERO
Vice-President

Samar SEN
Member

Geneva, 2 July 1992

R. Maria VICIEN-MILBURN
Executive Secretary